Supreme Court, U.S.
FILED
JUN 8 1995
OFFICE OF THE CLERK

(2)

No. 94-1692

In The

Supreme Court of the United States

October Term, 1994

JOHNSON & HIGGINS,

Petitioner,

vs.

BURT N. SEMPIER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES F. WASKEVICH, JR.
Counsel of Record
RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

24pp

QUESTION PRESENTED

Whether the court of appeals erred in concluding that respondent had produced sufficient evidence of discriminatory intent and pretext to defeat petitioner's motion for summary judgment?

LIST OF PARTIES

Petitioner, Johnson & Higgins, is a corporation incorporated under the laws of the State of New Jersey and is engaged in the insurance brokerage and employee benefits consulting businesses.

Respondent, Burt N. Sempier, is a resident of North Caldwell, New Jersey, and was an employee, officer and director of petitioner until respondent's employment and directorship with petitioner was wrongfully terminated by petitioner on June 11, 1991.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 12

REASONS FOR DENYING THE WRIT 13

THE COURT OF APPEALS DID NOT HOLD, AS PETITIONER CONTENDS, THAT AN EMPLOYEE ALWAYS SURVIVES SUMMARY JUDGMENT WHENEVER THE EMPLOYEE PRESENTS ANY EVIDENCE OF PRETEXT ON A MOTION FOR SUMMARY JUDGMENT 13

A. The Court of Appeals Correctly Held, Consistent With The Decision Of This Court in *Hicks*, That A Plaintiff Who Has Made Out A *Prima Facie* Case Of Discrimination May Defeat A Motion For Summary Judgment And Proceed To Trial By Producing Either Evidence Of Pretext Or Evidence Of Discrimination Sufficient To Permit The Trier Of Fact To Infer Discrimination And Find For The Plaintiff 14

B. The Court Of Appeals' Holding Neither Conflicts With The Decisions Of This Court Nor Other Courts Of Appeal So As To Present A Justiciable Issue Requiring Resolution By This Court 15

C. Petitioner's Dissatisfaction With The Court Of Appeals' Analysis Of The Evidence Does Not Present A Substantial Issue Appropriate For Resolution By This Court 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES CITED:

Anderson v. Liberty Lobby, 477 U.S. 242 (1986).....14, 18

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).....14, 18

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993).....14, 15, 16

No. 94-1692

In The

Supreme Court of the United States

October Term, 1994

JOHNSON & HIGGINS,

Petitioner,

vs.

BURT N. SEMPIER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Burt N. Sempier, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Johnson & Higgins.

STATEMENT OF THE CASE

A. Statement Of Facts

- **Respondent's Exemplary Employment With Petitioner**

Respondent, Burt N. Sempier, commenced employment with petitioner in petitioner's New York City office on September 1, 1968. (Ja 300.)[1] Throughout his employment with petitioner, respondent performed all duties assigned to him with unquestioned dedication and in an exemplary manner. (*Id.*) During his employment with petitioner, respondent was never advised that his performance was anything other than entirely satisfactory. (*Id.*; Ja 306; Ja 258; Ja 281.)

- **Respondent's Promotions**

From time to time during his employment with petitioner, respondent was promoted and received increases in his compensation. (Ja 301; Ja 20.) On May 4, 1987, effective May 20, 1987, respondent was promoted to the position of Chief Administrative Officer ("CAO") of petitioner. (Ja 301; Ja 20.) Respondent remained as petitioner's CAO until June 11, 1991 when respondent's employment was terminated on account of respondent's refusal to "voluntarily" retire from his employment and directorship with petitioner. (Ja 305-6.)

---

[1] "Ja ___" refers to the Joint Appendix filed in the court of appeals. References to the Appendix to the Petition are cited as "___a".

- **Respondent's Election and Reelection To Petitioner's Board Of Directors**

Petitioner's business and affairs are managed by a classified Board of Directors which consists of four classes of directors, each class of directors consisting of approximately one fourth of the entire Board. (Ja 628-9; Ja 848.) The term of office of the directors in each director class is for four years, and until their successors have been elected and qualified. (Ja 628-9.) Consecutively, the term of office of one of the four classes of directors expires each year. (*Id.*) Petitioner's Certificate of Incorporation does not make any provision for the removal of directors and, in particular, does not provide for the removal of any director without cause. (*Id.*)

On April 23, 1986 (effective April 1, 1986), respondent was duly elected by petitioner to serve as a director of petitioner through 1989, and until his successor was elected and qualified. (Ja 301; Ja 20-21.) On May 17, 1989, respondent was reelected to serve as a director of petitioner through December 1993, and until his successor was elected and qualified. (*Id.*)

- **Petitioner's "Pull/Push" Coercive Retirement Program**

In May of 1989, petitioner, through its chief executive officer, Robert V. Hatcher, Jr. ("Hatcher"), proceeded with petitioner's corporate program to reduce the size of its elderly workforce. (Ja 636.) The program began with a directive to senior managers by Hatcher, captioned as

petitioner's "Prospective Early Retirement Program", for the identification of "redundant" or "poorly performing" employees *who were coincidentally eligible for early retirement* (i.e., employees 55 years of age and older) for termination of their employment. (Ja 636 and 637; Ja 810a.) In responding to the Hatcher directive, petitioner's senior managers identified elderly employees who met Hatcher's criteria. (Ja 638-640.) "Redundant" or "poor performers" *who were coincidentally young* were not targeted. (*Id.*) By July 24, 1989, 86 employees had been identified for termination under petitioner's "Prospective Early Retirement Program", of which 70% were 55 years or older. (Ja 637.) By December 5, 1989, this number stood at 92. (Ja 641-2.)

Petitioner's Early Retirement Program utilized, by petitioner's own admission, a "pull/push" approach of terminating the employment of the "early retirement candidates". (Ja 637.) The "pull" approach consisted of initially offering the targeted employee an "incentive" in order to obtain the employee's voluntary decision to terminate his/her employment. (*Id.*) For the employee refusing to "voluntarily" retire, the "push" approach entailed the involuntary termination of the employee's employment wherein the employee's discharge was characterized " . . . as a downsizing with the identification of redundant positions on the basis of business activity needs". (*Id.*) The expressed purpose of the (mis)characterization of the employee's involuntary discharge was to specifically avoid any controversy as to the employees' (alleged) poor performance. (*Id.*)

- **Petitioner's Retirement "Proposals" And Respondent's Refusals to Retire**

On April 19, 1990, Hatcher met with respondent and advised respondent that a committee of unnamed senior managers of petitioner had decided that respondent should retire from his employment and directorship with petitioner. (Ja 301-2; Ja 800-801.) Hatcher explained to respondent that respondent had "lost credibility" with unnamed senior managers of petitioner, but Hatcher further explained that he could not specifically explain the so-called "lost credibility" other than to state that he did not share that (the unnamed senior managers') view, i.e., respondent had not "lost credibility" with Hatcher. (Ja 301-2; Ja 797.)

Respondent advised Hatcher that he had no intention of retiring his employment and directorship with petitioner and, instead, intended to continue in petitioner's employ through at least the conclusion of his current term as a director of petitioner – through December of 1993. (Ja 302; Ja 802; Ja 810.) Hatcher advised respondent that he should seriously consider the company's retirement offer because the unnamed senior managers "would let (respondent) rot, would cut (respondent's) balls off and otherwise would make it unpleasant for (respondent) to stay". (Ja 302.) Hatcher further advised respondent that under the financial terms of the company's retirement offer, respondent would not be hurt financially, and that if respondent retired, he would continue to receive annual compensation of $204,000 - $205,000 through December 1993, and respondent's post-retirement pension and other entitlements would remain as if he had

retired at the end of December, 1993. (*Id.*; Ja 803.) Hatcher advised respondent that he would provide respondent with a formal written proposal. (Ja 302.)

At the time Hatcher approached respondent, Hatcher was aware of petitioner's "Guidelines For Early Retirement". (Ja 811-812; Ja 665-666.) Those guidelines provided, *inter alia*,

> "Early retirement offers must be approved in all instances by the Corporate Human Resources Department and the Personnel & Compensation Committee. The law prohibits the termination of any employee because of age . . . . *If it can be demonstrated that an employee was coerced or otherwise intimidated into retiring, we could be charged with age discrimination.* This could be so, for example, if an employee accepted early retirement and it was later determined that the employee had not been given sufficient time to consider the offer *or otherwise had been placed under such pressure* that a reasonable person would feel compelled to resign." (emphasis added) (Ja 665.)

In September, 1990, respondent first received the written early retirement proposal from Hatcher. (Ja 302; Ja 643-645; Ja 804.) That proposal did not reflect the representations that Hatcher had made to respondent on April 19, 1990. (Ja 302; Ja 809.) Respondent advised Hatcher again in September that he had no interest in retiring from his employment and directorship with Johnson & Higgins. (Ja 302; Ja 810.)

On December 28, 1990, respondent received another written early retirement offer (dated December 10, 1990) from petitioner. (Ja 302-3; Ja 646-648; Ja 808.) The December 1990 early retirement proposal was slightly different

than the September, 1990 proposal to respondent, however, the financial terms offered to respondent were neither agreeable nor consistent with the representations that Hatcher had made to respondent on April 19, 1990. (Ja 303.) Respondent again advised Hatcher on December 28, 1990 that he had no interest in retiring from his employment and directorship with petitioner. (Ja 303; Ja 810.)

On January 7, 1991, respondent received a memorandum dated January 4, 1991 from David Olsen ("Olsen"), who had succeeded Hatcher and assumed the position of chief executive officer of petitioner on January 1, 1991. (Ja 303; Ja 649.) Olsen's memorandum renewed petitioner's early retirement offer with some proclaimed modifications. (Ja 303.) Respondent advised Olsen that he was not interested in retiring from his employment with petitioner. (Ja 303.)

In January of 1991, respondent retained counsel to represent him regarding the matters set forth above. (Ja 303.) During the balance of January and throughout February and March of 1991, Gardner M. Mundy ("Mundy"), a director, senior vice-president and secretary of Johnson & Higgins, and also an attorney, continued to present modified proposals to respondent that he retire his employment and directorship with petitioner, however, respondent found none of Mundy's proposals to be acceptable to him. (Ja 303.)

On February 20, 1991, respondent's attorney met with Mundy to discuss petitioner's efforts to retire respondent from his employment and directorship with petitioner and, in particular, to determine whether or not

petitioner was contending that respondent's work performance was poor. (Ja 304.) Mundy refused to address the subject of respondent's work performance. (*Id.*; Ja 254; Ja 258; Ja 281.)

- **Respondent's Suspension**

At the end of March, Mundy informed respondent that respondent had to make a decision on Mundy's last modified retirement proposal. (Ja 304.) Accordingly, respondent met with Olsen on March 27, 1991 and advised Olsen that Mundy's last early retirement offer was unacceptable, and suggested that Mundy, an attorney, should confer with respondent's counsel since petitioner was continuing to insist on respondent's early retirement. (*Id.*; Ja 650.) Olsen flew into a rage and told respondent that since respondent had hired an attorney, he could not come to work anymore. (Ja 304; Ja 80-1.) Olsen told respondent to immediately leave the company offices, and go home "on vacation". (*Id.*) Respondent protested but complied with Olsen's directive. (*Id.*)

- **Petitioner "Tightens The Screws"**

On or about April 10, 1991, Mundy called respondent at his home in New Jersey and sought a meeting with respondent to continue discussions regarding respondent's early retirement. (*Id.*) Respondent and Mundy met at the Yale Club in New York City on April 12, 1991 at Mundy's request, whereupon Mundy presented respondent with yet another modified early retirement proposal. (*Id.*) On April 14, 1991, respondent told Mundy that his proposal was unacceptable. (*Id.*) On April 15, 1991,

Mundy invited respondent to return to work and, accordingly, respondent returned to his employment with petitioner on April 15, 1991. (*Id.*)

Upon respondent's return to work, petitioner continued its effort to bring about respondent's early retirement from petitioner. Petitioner requested Hatcher, although now retired himself, to contact respondent and press the issue of respondent's early retirement from petitioner. Hatcher contacted respondent in late April 1991 and requested a personal meeting with respondent, but respondent decided not to personally meet with Hatcher. (Ja 304-5.) Instead, Hatcher conversed with respondent by telephone, wherein Hatcher told respondent with respect to Mundy's last early retirement proposal that respondent should "take the deal as it is offered now – it is not going to get any better". (*Id.*; Ja 651.) Hatcher also told respondent that respondent "had no choice and that pretending there are other options is simply prolonging a process which is becoming increasingly unpleasant for everyone". (Ja 651.) Hatcher added that "You can't keep pushing the firm and somehow remain its best friend". (*Id.*) Notwithstanding the harsh message presented to him by Hatcher, respondent told Hatcher that under the terms presented to him, respondent was simply not prepared to retire. (Ja 305.) On April 30, 1991, because of respondent's refusal to accede to Hatcher's request that he retire, petitioner, working with Attorney John Cannon of Sullivan & Cromwell *contrary to its own "Guidelines For Early Retirement"* (Ja 665-6), decided to "tighten the screws" on respondent in its efforts to pressure respondent's early retirement. (Ja 651.)

- **Petitioner's "Retirement Ultimatum"**

On May 28, 1991, Mundy presented respondent with petitioner's "Final *Severance* Proposal". (emphasis added.) (Ja 305; Ja 652-4.) Mundy informed respondent that he had until June 7, 1991 to consider that "proposal", that there would be no further discussion and that if respondent refused to retire from his employment with petitioner, petitioner would involuntarily terminate respondent's employment and directorship with petitioner by "accepting respondent's letter of resignation".[2] (Ja 305; Ja 655.)

- **Respondent's Refusal To Retire And The Termination Of Respondent's Employment**

Respondent advised petitioner on June 7, 1991 that he would not voluntarily retire from his employment and directorship with petitioner. (Ja 261.) Accordingly, on June 11, 1991, petitioner involuntarily terminated the employment and directorship of respondent under the guise of having "accepted respondent's letter of resignation". (Ja 305-6.)

At no time did petitioner conduct a proper and duly noticed meeting of its shareholders prior to or for the purpose of removing respondent as a director and employee during which respondent could have addressed the reasons for his discharge. Instead, Mundy allegedly telephoned petitioner's directors, advised them

---

[2] Because he was directed to do so, respondent had tendered an open-ended letter of resignation to petitioner on April 1, 1986 at the time he became a director. (Ja 389.)

that respondent's "performance has not justified his continuance as a Director", and obtained their "consent" for petitioner to "accept" respondent's "resignation", effective June 30, 1991. (Ja 261; Ja 305-6; Ja 718.) Other than his refusal to "voluntarily" retire from his directorship and employment with petitioner, respondent was never informed of any cause or reason for the termination of his directorship and employment with petitioner, particularly any reason involving his performance, and was not presented with any opportunity to address with his colleagues his involuntary discharge and removal as a director. (Ja 306.)

Subsequently, following the exhaustion of his administrative remedies before the United States Equal Employment Opportunity Commission ("EEOC") (Ja 490-496), respondent commenced suit against petitioner in the United States District Court for the District of New Jersey.[3] In responding to respondent's allegation that the termination of his directorship and employment was wrongful and unlawful, petitioner averred that it terminated respondent's employment because " . . . the Directors of petitioner who constituted the senior management of petitioner decided that respondent's performance did

---

[3] As a result of respondent's charge of discrimination against petitioner filed with the EEOC, the EEOC found cause to proceed against petitioner and *also* commenced a civil action against petitioner which alleges, *inter alia*, that petitioner maintains an unlawful pattern and practice of terminating the employment of its elder directors on account of their ages. (Ja 657-661.) That action, *EEOC v. Johnson & Higgins*, 93 Civ. 5481, is currently proceeding in the United States District Court for the Southern District of New York.

not warrant his continuing as a Director . . . ". (Ja 21.) During the discovery phase of the district court litigation, petitioner continuously declined to make specific allegations of respondent's *alleged* performance deficiencies, and refused to produce any evidence demonstrating or even suggesting poor performance by respondent. (16a; 20a-26a.)

B. The Proceedings Below

On March 9, 1994, the district court granted summary judgment in favor of petitioner and respondent appealed (Ja 891; Ja 910.) On January 6, 1995, the court of appeals reversed the district court's summary judgment. (1a.) The court of appeals specifically held that summary judgment was inappropriate inasmuch as respondent had produced sufficient evidence of discriminatory intent and pretext to defeat summary judgment, and factual conflicts on the ultimate issue – i.e., whether respondent was discharged for poor performance or because of his age – had to be resolved by a jury. (19a).

SUMMARY OF THE ARGUMENT

The court of appeals did not hold, as petitioner contends, that an employee always survives summary judgment whenever the employee presents any evidence of pretext on a motion for summary judgment.

A. The court of appeals correctly held, consistent with the decision of this court in *Hicks*, that a plaintiff who has made out a *prima facie* case of discrimination

may defeat a motion for summary judgment and proceed to trial by producing either evidence of pretext or evidence of discrimination sufficient to permit the trier of fact to infer discrimination and find for the plaintiff.

B. The court of appeals' holding neither conflicts with the decisions of this Court nor other courts of appeals so as to present a justiciable issue requiring resolution by this Court.

C. Petitioner's dissatisfaction with the court of appeals' analysis of the evidence does not present a substantial issue appropriate for resolution by this Court.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS DID NOT HOLD, AS PETITIONER CONTENDS, THAT AN EMPLOYEE ALWAYS SURVIVES SUMMARY JUDGMENT WHENEVER THE EMPLOYEE PRESENTS ANY EVIDENCE OF PRETEXT ON A MOTION FOR SUMMARY JUDGMENT

Petitioner's petition is premised on its mischaracterization of the decision of the court of appeals. According to petitioner, the court of appeals (at 17a) held that "evidence sufficient to establish a prima facie case together with evidence that the employer's explanation is 'unpersuasive or even obviously contrived,' . . . *always entitles* a plaintiff to survive defendant's motion for summary judgment" (emphasis added). (Pet, p. 14.) Clearly, that was not the court of appeals' holding. To the contrary, the court of appeals merely held that in the case *sub judice*, respondent had produced sufficient evidence of discrimination and pretext from which discrimination could be

inferred, and extant genuine issues of material fact as to petitioner's discriminatory intent and pretext could not be resolved on summary judgment. (19a.) Accordingly, since petitioner was unable to meet its burden on summary judgment, the summary judgment entered in favor of petitioner by the district court was reversed. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

A. The Court of Appeals Correctly Held, Consistent With The Decision Of This Court in *Hicks*, That A Plaintiff Who Has Made Out A *Prima Facie* Case Of Discrimination May Defeat A Motion For Summary Judgment And Proceed To Trial By Producing Either Evidence Of Pretext Or Evidence Of Discrimination Sufficient To Permit The Trier Of Fact To Infer Discrimination And Find For The Plaintiff

The court of appeals, in defining the applicable rule of law and relying upon this Court's decision in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993), *did hold* that a plaintiff *may* defeat a motion for summary judgment and proceed to trial by producing either (a) evidence of pretext or (b) evidence of discriminatory intent *sufficient* to permit the trier of fact to infer discrimination and find for the plaintiff. (14a-15a). In reviewing the evidence of record in the case *sub judice*, the court of appeals correctly concluded that respondent had produced compelling evidence of both pretext (15a-17a) and discriminatory intent (17a-18a) *sufficient to defeat petitioner's motion for summary judgment and to proceed to trial.* (18a-19a.) Accordingly, the summary

judgment entered errantly in favor of petitioner by the district court was reversed. (19a.)

B. The Court Of Appeals' Holding Neither Conflicts With The Decisions Of This Court Nor Other Courts Of Appeal So As To Present A Justiciable Issue Requiring Resolution By This Court

It is misleading for petitioner to suggest that the court of appeals' decision is at odds with this Court's decision in *Hicks* so as to present a justiciable issue requiring resolution by this Court. On the contrary, the court of appeals paid careful attention to the principles espoused by this Court in *Hicks* (see 14a-15a, 19a.) and, as set forth *supra*, merely held – under those principles – that extant issues of material fact could not be resolved on summary judgment.

It is also misleading for petitioner to suggest that the court of appeals' decision in *this case* presents a justiciable conflict with other courts of appeals requiring resolution by this Court. Referring to decisions of the courts of appeals of the First and Fifth Circuits (Pet, pp. 14-15), petitioner contends that the First and Fifth Circuits – unlike the court of appeals below – have understood the language of *Hicks* and its progeny " . . . to mean only that the probative value of such evidence will *sometimes* be sufficient to permit a finding of discrimination depending upon the totality of the record". (original emphasis) (Pet, p. 14). However, *that* interpretation of *Hicks – embraced by petitioner in its Petition* – actually coincides with the ruling of the court of appeals in the case *sub judice*! Specifically,

and contrary to the mischaracterization of petitioner, the court of appeals held, citing *Hicks*, that:

> "Rejection of the employer's nondiscriminatory explanation does not compel a verdict in favor of the employee, but it *permits* the trier of fact to infer discrimination and find for the plaintiff on the basis of the allegations of discrimination in his prima facie case. 'The factfinder's disbelief of the reasons put forward by the [employer] . . . *may*, together with the elements of the [employee's] prima facie case, *suffice to show intentional discrimination*' ". (citations omitted) (emphasis added)

(14a-15a). The court of appeals, however, also noted that in the case *sub judice* that respondent had come forward with substantial evidence of discriminatory intent and pretext and the resultant presence of questions of material fact made this case inappropriate for disposition on a motion for summary judgment. (19a.) In short, petitioner had not met its burden on summary judgment.

Whether or not the evidence produced by respondent (along with that produced by petitioner) *will be* sufficient to permit a finding of discrimination is one, according to the court of appeals, which will be determined by the finder of fact. The court of appeals said nothing about what the finder of fact "had to do" at that stage of the proceedings. Thus, in concluding its analysis of the inappropriateness of the district court's grant of petitioner's summary judgment motion, the court of appeals stated:

> "Sempier's attack on J&H's stated reasons for his discharge leaves us with the paradigmatic

> case in which each party has produced testimony and evidence that conflicts on the ultimate issue - whether Sempier was discharged for poor performance or because of his age. The resulting conflict must be resolved by a jury and cannot be resolved on summary judgment. Thus, the summary judgment entered in favor of J&H must be reversed." (footnote omitted)

(19a.)

Thus, the court of appeals' decision is in accord with both *Hicks* and *the decisions of other courts of appeals embraced by petitioner in its petition.*

C. Petitioner's Dissatisfaction With The Court Of Appeals' Analysis Of The Evidence Does Not Present A Substantial Issue Appropriate For Resolution By This Court

While the petition *attempts* to portray the court of appeals' decision as being in conflict with the decisions of this Court and other courts of appeals in an effort to manufacture an issue of "substantial importance" requiring resolution by the Court, the petition essentially does no more than quarrels with the inferences drawn by the court of appeals from the factual record and the court of appeals' resultant conclusion that summary judgment was improper in this case. See, e.g., the lengthy discussion at footnote 6 of the petition wherein petitioner incorrectly argues that the court of appeals should have drawn inferences from the evidence in favor of petitioner, the moving party on the summary judgment motion, rather than in favor of respondent, the opposing party. Compare Pet, pp. 19-20, fn. 6 with the court of appeals' correct

handling of the evidence at 6a-9a and 15a-19a. Petitioner's criticism of the court of appeals' conclusion that summary judgment was inappropriate ignores the principles espoused by this Court in *Celotex* and *Anderson*.

Similarly, petitioner errantly attacks the court of appeals' handling of the evidence of pretext by arguing that the court of appeals "misconstrued" petitioner's explanation for terminating respondent's employment. Incredibly, petitioner argues that the court of appeals did not "fairly characterize" petitioner's position (that it terminated respondent's employment because of respondent's *allegedly* poor work performance). (Pet, p. 10.) See, however, Ja 21; Ja 261; Ja 305-6; Ja 718. While petitioner seeks to ignore – indeed erase – the fact that it unfairly and wrongfully attacked the reputation of a man with an exemplary work record in its effort to bring about his involuntary retirement, the court of appeals did not. Rather, the court of appeals focused on the *evidence* and correctly concluded:

> "Where, as here, Sempier asserts not only that he performed well but that he never received any unfair criticism that his performance was poor or inadequate, the jury could conclude that J&H's failure to fault Sempier's performance for the 20 years prior to the negotiations leading to his discharge makes suspect its *post hoc* assertions of poor performance. This is especially true when J&H has failed to produce any other evidence of poor performance or make specific allegations of Sempier's deficiencies".

(16a.)

Petitioner's baseless dissatisfaction with the court of appeals' examination of the record and conclusions hardly presents a substantial issue requiring resolution by this Court.[4]

CONCLUSION

Respondent prays that this Court deny petitioner's petition for a writ of certiorari because the court of appeals' holding was not in error, and the case *sub judice* does not present a substantial issue appropriate for this Court's review.

Respectfully submitted,

CHARLES F. WASKEVICH, JR.
Counsel of Record
RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

Attorneys for Respondent

[4] The court of appeals' reversal of the district court's grant of summary judgment is particularly appropriate in view of the court of appeals' additional finding and conclusion that petitioner had wrongfully refused to respond to respondent's discovery requests seeking, *inter alia*, evidence of both pretext and discriminatory intent. (See 19a-28a and, in particular, fn. 9 at 21a.) For that reason *alone*, the district court's grant of summary judgment to petitioner was improper. For that reason *alone*, the petition should also be denied.